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Supreme Court of the United States

October Term, 1970

No. 1569

FIBREBOARD CORPORATION, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, UNITED STEELWORKERS OF AMERICA, AFL-CIO

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE UNITED STEELWORKERS OF AMERICA, AFL-CIO IN OPPOSITION

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The opinions below, jurisdictional statement, questions presented and the provisions of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq*) germane to the instant petition are set forth in detail in the Board's brief in opposition to be filed simultaneously herewith. As amply demonstrated in the Board's brief in opposition, there is plainly no basis for granting the petition for a writ of certiorari insofar as the Company contends either that: (1) the Board exceeded its authority by adding a sum for interest to the Company's backpay liability even though its original remedial order did not so provide expressly; or (2) the Board abused its discretion in refusing to consider, in this supplemental backpay proceeding, a defense that alleged employee misconduct precludes reinstate-

[1] Hereinafter "the Steelworkers" or "the Union."

ment where this defense was not, but could have been, raised in the initial unfair labor practice proceeding. No worthwhile purpose would be served by the Steelworkers independently elaborating on the Board's position concerning these issues.

1. However, we do feel constrained to express our views concerning the Company's attempt to invoke this Court's reviewing authority based on a broad scale attack on the Board's exercise of its remedial powers in the instant circumstances. The Company's petition furnishes a convenient point of departure; at pp. 10-11 thereof the Company argues essentially that the formula by which the Board computed the Company's backpay obligation was at odds with this Court's prior holding in this very case (379 U.S. 203).

On the contrary, as we show below, close examination of the Company's position reveals that it is *now* in the untenable posture of seeking certiorari predicated on the very substantive arguments which it previously raised and this Court expressly rejected when the Company last stood before it. Thus, as found by the Board,[2] the Company engaged in an illegal refusal to bargain when in July 1959—just before its current contract with the Steelworkers was due to expire—it unilaterally contracted out the maintenance work formerly performed by approximately 50 employees in the bargaining unit represented by Steelworkers.

Although the Board found this decision was motivated only by economic considerations, the Board not only issued the traditional order requiring the Company to bargain prospectively but also ordered a restoration of the *status quo* as of the date of the initial refusal to bargain—i.e., the Board ordered the Company to resume its maintenance operations and offer the terminated machinists reinstatement and backpay to make them whole for lost earnings

[2] 138 NLRB 550.

resulting from their unlawful termination.[3] The Court of Appeals for the District of Columbia Circuit enforced the Board decision and order.[4]

Significantly, in attempting to persuade this Court not to enforce the Board's order, the Company argued vigorously in 1964 (br. pp. 42-46) that the order was "punitive" and in excess of the agency's power precisely because it was being required to resume an uneconomical maintenance operation in circumstances where it was not at all certain that the Company would have agreed to such resumption even *if* it had satisfied its statutory duty to bargain with the Union concerning the contracting out of this work. In this connection, the Company's 1964 brief speaks for itself:

> "Nor is there any basis in the record for the Board's assertion that 'the loss of employment stemmed directly' from the refusal to bargain. That assertion assumes that bargaining would have resulted in abandonment by Petitioner of its plan to contract out the work. The Board might with equal justification have assumed that bargaining would have resulted in acceptance by Petitioner of the Union's wage and other demands. There was no more warrant for the Board's assumption that bargaining would have resulted in abandonment of the plan to contract out the work than there was for a similar assumption which caused this Court to overturn a Board order in the completely analogous

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[3] The Board limited the Company's backpay obligation to an amount "based upon the earnings which they normally would receive from the date of [its decision] . . . to the date of [the Company's] offer of reinstatement." 138 NLRB 550, 555 and n. 21. Simply put, had the Company complied with the Board's order entered on September 13, 1962, it would not have been faced with any backpay obligation. Instead, however, it chose to defy the order. As a result in the ensuing two year period its backpay liability built up while its legal arguments failed—first before the Court of Appeals (322 F.2d 411) and then this Court (379 U.S. 203).

[4] 322 F.2d 411.

> case of *Consolidated Edison Co.* v. *NLRB,* 305 U.S. 197 (1938)." (Co. brief p. 44)
>
> . . . "*Speculation* . . . that bargaining would have had one outcome [a new contract with Steelworkers] rather than another [implementation of the Company's decision to contract out its maintenance operation] is, we submit, not a proper basis for a Board order" (Co. brief p. 46) (Emphasis added) . . . "The requirement that bargaining be preceded by a resumption of operations which had been abandoned as too costly and by reinstatement with back pay of employees who had been terminated because their services were no longer needed is, we submit, punitive." (*ibid.*)

Plainly, then, in determining whether to enforce the Board's order this Court was directly confronted by the Company's above-quoted contentions that enforcement should be denied because the order rested on "speculation" as to what would have happened in bargaining. This argument was expressly rejected. Thus, the Court stated (379 U.S. at 215-216):

> "The only question remaining is whether, upon a finding that the Company had refused to bargain about a matter which is a statutory subject of collective bargaining, the Board was empowered to order the resumption of maintenance operations and reinstatement with back pay. We believe that it was so empowered. . . ."
>
> "That Section [10(c)] 'charges the Board with the task of devising remedies to effectuate the policies of the Act.' *Labor Board* v. *Seven-Up Bottling Co.,* 344 U.S. 344, 346. The Board's power is a broad discretionary one, subject to limited judicial review. *Ibid.* '[T]he relation of remedy to policy is peculiarly a matter for administrative competence. . . .' *Phelps Dodge Corp.* v. *Labor Board,* 313 U.S. 177, 194. 'In fashion-

ing remedies to undo the effects of violations of the Act, the Board must draw on enlightenment gained from experience.' *Labor Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346. The Board's order will not be disturbed 'unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.' *Virginia Elec. & Power Co.* v. *Labor Board,* 319 U.S. 533, 540. Such a showing has not been made in this case."

"There has been no showing that the Board's order restoring the *status quo ante* to insure meaningful bargaining is not well designed to promote the policies of the Act. Nor is there evidence which would justify disturbing the Board's conclusion that the order would not impose an undue or unfair burden on the Company."

In sum, an integral part of this Court's decision was its recognition that the Company would thereby be required to resume its maintenance operations and reinstate its employees with backpay—notwithstanding the Company's explicit claim that said operation was "too costly" and had it negotiated with the Steelworkers it would *not* have abandoned its plan to contract out this work. The lone issue left unresolved by the decision of this Court was the amount of backpay each employee was entitled to receive covering the period from September 13, 1962, to January 18, 1965, when the Company offered reinstatement.

Pursuant to its customary procedures, the Board thereafter determined this in the instant supplemental backpay proceeding. The formula utilized in an effort to approximate what the backpay claimants would have received absent their unlawful termination was the so-called "Pabco" wage formula. The reasonableness of that formula was reflected, *inter alia,* by the fact that it had been in effect for the eight year period immediately preceding the machin-

ists' discharge in July 1959 (A. 58-59, 548-549, 624, 695. "A" references are to the bound appendix to the briefs in the court below).

Accordingly, this entire matter should have been put to rest—as indeed the court below so held (436 F.2d 908). For under settled law where, as here, the employer's unfair labor practices have made it difficult to determine precisely the amount of backpay due ". . . the Board may use as close approximations as possible and may adopt formulas reasonably designed to produce such approximations . . . [W]ith respect to the formula . . . which the Board may deem necessary to devise in a particular situation, [judicial] inquiry may ordinarily go no further than to be satisfied that the method selected cannot be declared to be arbitrary or unreasonable in the circumstances involved" (*NLRB* v. *Brown & Root, Inc.*, 311 F.2d 447, 452 (8th Cir.)). Accord: *NLRB* v. *Rice Lake Creamery Co.*, 365 F.2d 888, 891 (CADC); *NLRB* v. *Charley Toppino & Sons, Inc.*, 358 F.2d 94, 97 (5th Cir.); *NLRB* v. *Ellis and Watts, Inc.*, 344 F.2d 67, 69 (6th Cir.); *Buncher* v. *NLRB*, 405 F.2d 787, 790 (3rd Cir.) (*en banc*), cert. denied, 396 U.S. 828.

Now, however, six and one-half years after the initial *Fibreboard* decision by this Court, the Company is attempting to relitigate the very argument which, as explained above, was already expressly rejected. For the crux of the Company's argument for granting the writ here (br. pp. 10-11) is that is was speculative and, in turn, punitive for the Board to utilize the Pabco formula in assessing backpay where there was no certainty that the parties would have agreed to this wage scale if the negotiations had occurred. The short answer is that this argument is essentially an unchanged version of the position it urged in its previous abortive attempt to preclude enforcement of the Board's initial order requiring a resumption of the maintenance operations and reinstatement with backpay. The earlier *Fibreboard* opinion of this Court is plainly the law of the

case and there is no possible basis for granting the Company's petition on the grounds of an alleged conflict between that decision and the Board's instant supplemental backpay order.

Indeed, the Company's argument proves too much. Of necessity, once this Court affirmed the Board's initial order this meant that in a subsequent backpay proceeding the agency would have to try to ascertain what the employees *would have* received absent any refusal to bargain. This necessarily meant that the Board's backpay award could be challenged as "speculative." That is, irrespective of whether the Board applied the Pabco formula, or instead awarded backpay commensurate with the wages paid to two millwrights employed by the Company during the backpay period (the formula favored by the Company) or, indeed, chose any other method of computation—it was engaged in the speculative task of attempting to estimate on some rational basis what the employees would have received.

Thus, the real source of the Company's present dissatisfaction with the speculative nature of the backpay award derives from the opinion of this Court enforcing the Board's initial order, not the supplemental backpay proceeding. And surely it is too late in the day for the Company now to challenge this Court's original decision.

2. Nor is there any basis for granting certiorari on the grounds that a conflict exists between the Board's instant decision and *Ex-Cell-O Corp.*, 185 NLRB No. 20, 74 LRRM 1740. There, the Board held (in a 3-2 decision) that it lacked the statutory power to require a company to compensate employees for monetary losses incurred as a result of its unlawful refusal to recognize and bargain with the Union. Obviously, the *Ex-Cell-O* case represents a very important doctrinal decision which will have recurring and widespread application; whereas the instant case turns on its peculiar facts which are non-recurring in nature.

It may be that the instant case is distinguishable from

Ex-Cell-O because here the unfair labor practice resulted in the loss of jobs of employees which naturally triggered the need for a backpay remedy whereas in *Ex-Cell-O* the employees were denied the fruits of the monetary benefits flowing from collective bargaining but not their employment. See also, the opinion of Judge MacKinnon, concurring in part and dissenting in part, in *IUE* v. *NLRB (Tiidee Products, Inc.),* 426 F.2d 1243, 1255-1256 (CADC). If this be so, then clearly there is no warrant for the Court to invoke its reviewing authority here.

Further, there are compelling reasons why this Court should deny certiorari here, even if the Board's *Ex-Cell-O* doctrine *did* conflict with its decision in the instant backpay proceeding. At this juncture, *Ex-Cello-O* is a judicially discredited doctrine. On March 19, 1971, the Court of Appeals for the District of Columbia Circuit, on motion of the petitioning union involved therein, granted summary reversal and remanded the case to the Board. *Auto Workers* v. *NLRB (Ex-Cell-O Corp.),* —— F.2d ——, 76 LRRM 2753. In essence, the Court held that as a matter of law the Board erred in concluding that it lacked authority under Section 10(c) of the Act to award "make-whole" compensation to employees for a period of an unlawful refusal to bargain.[5] In so holding the court relied heavily upon this Court's decision in *Fibreboard.*[6] Thus, the court below

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[5] The Court concluded (*supra* at 2754) that the Board should exercise its discretion in determining whether "make-whole" compensation is appropriate in particular circumstances and, in doing so, it could well draw a distinction between a refusal to bargain based on a challenge to an election which raises a "debatable question" and a clearly unjustified refusal resting on a challenge to an election "palpably without merit." See also, *IUE* v. *NLRB (Tiidee Products Inc.), supra.*

[6] See *Tiidee, supra,* 426 F.2d at 1248-1249 where the court below cites *Fibreboard* (379 U.S. at 216) to support the conclusion that the broad scope of the Board's remedial powers belies its claim in *Ex-Cell-O* that the Act precludes it from fashioning a compensatory "make-whole" remedy an unlawful refusal to bargain case.

has already removed the potential conflict. By affirming this case and reversing *Ex-Cell-O,* it has implemented the rationale of *Fibreboard* in both cases.

Finally, if the Board determines not to accept the remand in *Ex-Cell-O,* it must petition for a writ of certiorari. If it does so the question whether this Court will review that doctrine would be presented through the appropriate vehicle—the *Ex-Cell-O* case itself—rather than indirectly in the context of the unique and non-recurring facts presented in this proceeding.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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